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No. 96-976

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, AND JACK BUTLER RACKLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a criminal prosecution on charges of conspiracy, misapplication of bank funds, and making false banking entries because petitioners had previously paid $44,000 in civil penalty assessments imposed by the Comptroller of the Currency based on the same underlying conduct.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-8a, 69a-81a) are reported at 92 F.3d 1026 and 14 F.3d 536, respectively. The order of the district court (Pet. App. 9a-14a) is reported at 879 F. Supp. 1113. A prior order of the district court (Pet. App. 82a-88a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1996. A petition for rehearing was denied on September 20, 1996. Pet. App. 18a-19a. The petition for a writ of certiorari was filed on December

17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In August 1992, a grand jury in the Western District of Oklahoma returned an indictment charging petitioners John Hudson, Larry Baresel, and Jack Rackley with conspiracy to misapply bank funds and to make false banking entries, in violation of 18 U.S.C. 371. Pet. App. 9a. In addition, the grand jury charged Hudson with 19 counts, Baresel with 15 counts, and Rackley with 17 counts of misapplication of bank funds, in violation of 18 U.S.C. 656. Rackley also was charged with two counts of making a false banking entry, in violation of 18 U.S.C. 1005. Pet. App. 9a. Before trial, petitioners moved to dismiss the indictment on double jeopardy grounds. The district court denied the motion, *id.* at 82a-88a, and petitioners appealed. The court of appeals reversed in part, vacated the district court's decision in part, and remanded for further proceedings. *Id.* at 69a-81a. On remand, the district court granted petitioners' motion to dismiss the indictment. *Id.* at 9a-14a. The court of appeals reversed. *Id.* at 1a-8a.

1. Petitioner Hudson was the majority owner of five banks in Oklahoma, including the First National Bank of Tipton, Oklahoma, and the First National Bank of Hammon, Oklahoma. In 1986 and 1987, petitioner Baresel was a member of the boards of directors of the Tipton and Hammon banks. During approximately the same period, petitioner Rackley was the president of the Tipton bank and a member of the board of directors of the Hammon bank. Pet. 3; Gov't C.A. App. 3.

On February 13, 1989, the Office of the Comptroller of the Currency issued a "Notice of Assessment of a Civil Money Penalty" against petitioners. Pet. App. 89a-98a. The Notice alleged that petitioners had violated 12 U.S.C. 84 and 375(b) and 12 C.F.R. 31.2(b) and 215.4(b) by causing the banks with which they were associated to make loans to nominee borrowers in a manner that allowed petitioners to receive the benefit of the loans. Pet. App. 92a-93a, 94a-95a. The Notice alleged that the nominee loans resulted in losses to the Tipton and Hammon banks of nearly $900,000 and contributed to their failures. *Id.* at 97a. The Notice assessed penalties of $100,000 against Hudson and $50,000 each against Baresel and Rackley. *Id.* at 89a. On August 31, 1989, the Comptroller issued a "Notice of Intention to Prohibit Further Participation" against each petitioner. *Id.* at 99a-128a. Each of those notices sought to prevent petitioners from "further participation, in any manner, in the conduct of the affairs of any insured depository institution." *Id.* at 99a, 109a, 119a.

In late 1989, each petitioner resolved the proceedings initiated by the Notices filed by the Comptroller by entering into a "Stipulation and Consent Order." Pet. App. 129a-143a. In those consent orders, Hudson agreed to pay a $16,500 assessment, Baresel agreed to pay a $15,000 assessment, and Rackley agreed to pay a $12,500 assessment. *Id.* at 130a, 140a, 135a. Each petitioner also agreed not to participate in banking activities without the written authorization of the Comptroller and any other applicable regulatory agency. *Id.* at 130a-131a, 136a-137a, 141a-142a. The consent orders further stated that they did not preclude the United States from bringing "other actions deemed

appropriate" against petitioners. *Id.* at 133a, 138a, 143a.

2. In August 1992, petitioners were indicted in the Western District of Oklahoma on charges of conspiracy, misapplication of bank funds, and making false bank entries. The violations charged in the indictment rested on the same conduct that formed the basis for the prior administrative proceeding brought by the Comptroller of the Currency. Pet. App. 69a. Petitioners moved to dismiss the indictment, arguing that their conviction on the charged offenses would result in multiple punishments, in violation of the Double Jeopardy Clause. *Id.* at 82a.

The district court denied the motions. Pet. App. 82a-87a. The court found that the "nonparticipation agreement and the agreed fines were solely remedial" and thus that they did not impose punishment on petitioners. *Id.* at 85a-86a. Because the administrative proceeding did not punish petitioners, the court concluded, conviction on the criminal indictment would not impose a second punishment on petitioners in violation of the Double Jeopardy Clause. The court also found that petitioners had waived any right to raise their double jeopardy claim by agreeing to the stipulation's provision that allowed the government to bring "other actions deemed appropriate." *Id.* at 88a.

3. The court of appeals vacated the district court's decision in part and remanded for further proceedings. Pet. App. 69a-81a. The court began by rejecting the district court's view that petitioners' stipulation that the government could bring "other actions deemed appropriate" precluded them from seeking a dismissal on double jeopardy grounds. *Id.* at 71a-72a. The court also held that, in considering double jeopardy claims under *United States* v. *Halper*, 490

U.S. 435 (1989), it would attach no significance to the fact that *Halper* involved a civil sanction that followed a criminal prosecution, rather than (as here) a criminal prosecution that followed a civil sanction. Pet. App. 75a.

Relying on *United States* v. *Bizzell*, 921 F.2d 263 (10th Cir. 1990), the court of appeals then held that petitioners were not "punished" by the stipulation provisions that barred them from engaging in further banking activity, because those provisions were a "means of protecting the integrity of the banking system and the interests of depositors" and thus had "a legitimate remedial purpose." Pet. App. 75a-78a. The court concluded, however, that the existing record did not permit the same conclusion with respect to the monetary sanctions. In particular, the court expressed doubt that the statutes under which the Comptroller had imposed the monetary sanctions were "exclusively remedial." *Id.* at 79a. The court also concluded that the district court's "determination that the amounts of the fines were reasonable was without any factual support in the record," because the district court "made no findings as to the actual losses incurred nor who may have suffered the losses, and how they compared to the sanctions imposed." *Id.* at 80a.

The court of appeals accordingly vacated the district court's ruling that the monetary sanctions were remedial, and it remanded to the district court with instructions to determine "the precise injury caused to the Government for which the sanctions are the remedy." Pet. App. 80a. If the district court found that the government had been injured, the court of appeals instructed the district court to determine "if the fines were in fact intended solely to remedy the

injury, which will include a determination whether they were reasonable." *Id.* at 81a. The court of appeals noted that the district court might also have to decide whether the civil and criminal proceedings "relate[d] to the same offense" for double jeopardy purposes. *Ibid.*

4. On remand, after an evidentiary hearing, the district court reversed its prior decision and dismissed the indictment. Pet. App. 9a-14a. First, the court found that the Consent Orders that terminated the administrative proceeding and the indictment "involve the same conduct." *Id.* at 11a. It reasoned that the conduct prohibited by 12 U.S.C. 93(b) and 504, the statutes authorizing the Comptroller to assess monetary penalties, "necessarily encompasses the conduct which is the subject of 18 U.S.C. § 656," one of three statutes under which the defendants were indicted. Pet. App. 12a. On that basis, the court held that the administrative proceeding and the criminal indictment addressed the same offenses. *Id.* at 11a-12a.

The court then turned to the question whether the monetary sanctions were "solely remedial." The court noted that the Office of the Comptroller's policy and procedures manual states that a civil monetary penalty may serve as a "deterrent to similar violations by the persons against whom the penalties are assessed and by other banks and bankers" and that public disclosure of civil money penalties "may serve as a deterrent to future violations." Pet. App. 13a. In addition, the court observed that the Comptroller determined the amount of the monetary sanction imposed on each violator by using the Comptroller's "civil money penalty matrix," which looks to the violator's intent, number of violations, and efforts to

conceal the violations, but which does not list "injury to the government." *Ibid.* On that basis, the court concluded that the evidence did "not indicate that injury to the government was considered by the [Comptroller] in deciding the amount of the penalties to be imposed." *Id.* at 13a-14a. Although the court acknowledged that the Comptroller had incurred costs of $72,000 in investigating the offenses committed by petitioners, it found no evidence that the $44,000 assessed against petitioners was related to those costs. For those reasons, the court concluded that the "monetary assessments against [petitioners] were not solely remedial." *Id.* at 14a. "Assuming, *arguendo*, that these had some remedial purpose," the court explained, "the evidence establishes that they were at best partially designed to serve as a deterrent. Thus, the fines were punitive for double jeopardy purposes." *Ibid.*

5. The court of appeals reversed. Pet. App. 1a-8a. The court held that under *United States* v. *Halper*, 490 U.S. 435, 449-451 (1989), a civil assessment is not punishment "when it bears a rational relation to the goal of compensating the government for its loss." Pet. App. 4a. Here, the court held, "there was no gross disproportionality between the total fines imposed, $44,000, and the proven damages to the government, $72,000." *Ibid.* Accordingly, the court concluded, the administrative sanctions "can fairly be characterized as remedial." *Id.* at 6a (internal quotation marks omitted).

The court of appeals rejected the premise, on which the district court had relied, that the administrative assessments were punitive because of the "subjective intent" of the Comptroller to deter future violations. Instead, the court of appeals held that "the *Halper*

test 'constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding.'" *Ibid.* (quoting *Halper*, 490 U.S. at 453 (Kennedy, J., concurring)). The court noted its agreement with decisions of other courts of appeals that had permitted administrative fines to be justified as remedial in light of the government's investigatory costs, even when the agency had not considered those costs when imposing the penalty. Pet. App. 6a-8a (citing *United States* v. *Furlett*, 974 F.2d 839 (7th Cir. 1992); *United States* v. *WRW Corp.*, 986 F.2d 138 (6th Cir. 1993)).[1]

DISCUSSION

The court of appeals correctly rejected petitioners' claim (Pet. 10-15) that their criminal prosecutions must be dismissed because the monetary assessments previously imposed by the Comptroller of the Currency constitute "punishment" for the criminal offenses charged in the indictment. The circuits are divided, however, on the extent to which monetary penalties imposed as part of civil regulatory enforcement schemes trigger double jeopardy scrutiny. Because that issue is recurring and important, the Court should grant the petition to consider it.

1. In *United States* v. *Halper*, 490 U.S. 435 (1989), this Court held that after imposition of a criminal punishment, the Double Jeopardy Clause's "multiple punishments" prohibition barred imposition of a civil

[1] Because the court found that the Comptroller's sanctions were not "punishment," it declined to reach the government's argument that the civil assessments did not involve the "same offenses" as were charged in the indictment. Pet. App. 3a n.3.

penalty under the False Claims Act that was "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 442. The Court stressed that the government "is entitled to rough remedial justice, that is, it may demand compensation according to a somewhat imprecise formula * * * without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis." *Id.* at 446. *Halper* also cautioned that the Court was announcing "a rule for the rare case, such as the one before [it], where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449.

This Court's decisions since *Halper* have confirmed the limited reach of that decision. In *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767 (1994), the Court held that a nominally civil proceeding to collect a drug "tax" was inherently punitive in all applications, and thus was barred under the Double Jeopardy Clause because of the defendants' prior prosecution. *Id.* at 784. The Court nevertheless concluded that it would be "inappropriate" to extend *Halper*'s multiple-punishments analysis to "tax statutes[,] [which] serve a purpose quite different from civil penalties." *Ibid.*; see also *id.* at 785-787 (Rehnquist J., dissenting). Last Term, in *United States* v. *Ursery*, 116 S. Ct. 2135 (1996), the Court emphasized that *Halper* made no "sweeping change in the law" and did not "supplant" existing double jeopardy doctrine, but instead has a "narrow scope." *Id.* at 2146 n.2. The Court accordingly declined to extend *Halper*'s analysis to civil *in rem* forfeitures, which serve nonpunitive aims that are difficult to quantify. *Id.* at 2145-2146. At the same time, the Court rejected the

view that a civil sanction that is designed to deter misconduct necessarily constitutes "punishment" within the meaning of the Double Jeopardy Clause. See *Ursery*, 116 S. Ct. at 2145-2146 n.2, 2149; see also *Bennis* v. *Michigan*, 116 S. Ct. 994, 1000 (1996); *Kurth Ranch*, 511 U.S. at 779-780.

Petitioners take the broad view (Pet. 12-13) that whenever in personam monetary assessments are imposed "for the stated purpose of deterring alleged misconduct," and the government does not claim that it is a victim, the assessments are necessarily punitive for purposes of the Double Jeopardy Clause. That contention, however, overlooks this Court's recognition that "we long have held that this purpose [of deterrence] may serve civil as well as criminal goals," *Ursery*, 116 S. Ct. at 2149, and that "a deterrent purpose" may be "distinct from any punitive purpose," *Bennis*, 116 S. Ct. at 1000. That point applies with particular force to monetary sanctions, such as those employed here, that form part of the array of civil tools available to an agency to enforce a regulatory scheme. Furthermore, in contrast with petitioners' view that the recovery by the government of its costs of prosecution is inherently punitive (see Pet. 10-11), *Halper* itself made clear that the government's remedial ends "of course include[] not merely" the recovery of its direct pecuniary losses, "but also ancillary costs, such as the costs of detection and investigation." 490 U.S. at 445; see also *id.* at 442. The Court stated the point more generally in *Kurth Ranch*, where it noted that, in cases in which *Halper*'s analysis applies, "a so-called civil 'penalty' may be remedial in character if it merely reimburses the government for its actual costs arising from the defendant's criminal conduct." 511 U.S. at 777; see

also *id.* at 794 (O'Connor, J., dissenting) (noting that government may properly recover its costs of "detecting, investigating, and raiding [the defendants' drug] operation, the price of prosecuting them," and the cost of "incarcerating those who received prison sentences").[2]

2. The circuits are divided on the proper analysis of civil monetary penalties in the regulatory setting. In *S.A. Healy Co.* v. *OSHRC*, 96 F.3d 906 (7th Cir. 1996), petition for cert. pending (filed Feb. 14, 1997), the Secretary of Labor sought to assess civil penalties for multiple violations of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. 651 *et seq.*, that resulted in three deaths. The Seventh Circuit ruled, however, that collection of the penalties was barred by the Double Jeopardy Clause, because the defendant previously had been criminally convicted on three misdeameanor counts under OSHA in connection with the same events. 96 F.3d at 910-911.

The Seventh Circuit concluded in *Healy* that administrative monetary sanctions assessed as a result of a defendant's non-compliance with work safety standards categorically constitute "punishment" for purposes of the Double Jeopardy Clause, even when they reasonably compensate the government for its

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[2] That point is also reflected in this Court's cases before *Halper*. See, *e.g.*, *Helvering* v. *Mitchell*, 303 U.S. 391, 401 (1938) (penalty for fraudulent avoidance of a tax found remedial because the penalty is provided "for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud"); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972) (forfeiture provision found remedial in part because it "serves to reimburse the Government for investigation and enforcement expenses").

costs of investigation and prosecution in the particular case. In so doing, that court stated that it disagreed with the contrary conclusions reached by the Tenth Circuit in this case and by the Sixth Circuit in *United States* v. *WRW Corp.*, 986 F.2d 138 (1993). See *Healy*, 96 F.3d at 910-911. The court also departed from its prior analysis in *United States* v. *Furlett*, 974 F.2d 839 (1992), on which the Tenth Circuit had relied in this case. The Seventh Circuit's analysis was based on its view that *Halper* teaches that "general and specific deterrence" are objects solely of the criminal law, see 96 F.3d at 910; see also *id.* at 911 ("A penalty designed to deter wrongdoing is punishment"), and its further view that *Ursery* "shows that *Halper* displaced older approaches [to double jeopardy analysis] and is now the point of reference for the inferior courts." *Id.* at 910.

Under *Healy*, and in contrast to the approach taken by the Sixth and Tenth Circuits, it would appear that many civil money penalties imposed when the government is not a victim of an offense (*i.e.*, when the government is acting as regulator) would be deemed to constitute "punishment" for double jeopardy purposes. Recognizing that it had created a circuit conflict, the panel in *Healy* circulated the opinion to all active judges on the Seventh Circuit. A majority did not call for rehearing en banc.[3] See 96 F.3d at 911 n.* (noting that Judges Flaum, Ripple, and Rovner had voted to hear the case en banc).

[3] On February 14, 1997, we filed a petition for certiorari in *Healy* asking the Court to hold that petition pending its consideration and disposition of the petition in this case. We are providing a copy of our petition in *Healy* to petitioners in this case.

3. The circuit conflict warrants this Court's resolution. Many federal agencies are authorized to seek civil money penalties for regulatory violations, and such proceedings are often pursued in tandem with referrals for criminal prosecution based on the same underlying conduct. The disagreement in the lower courts on the proper double jeopardy analysis creates uncertainty about how such parallel proceedings should be pursued. Review of this case would permit the Court to provide guidance on proper approaches to the double-jeopardy "punishment" question when an agency imposes civil money penalties to further regulatory aims. This case may also provide the Court with an opportunity to decide the question, which it has now twice left open, see *Ursery*, 116 S. Ct. at 2140 n.1; *Kurth Ranch*, 511 U.S. at 781 n.21, and which the court of appeals decided against the government in this case, see Pet. App. 75a, of the extent to which a purportedly punitive civil sanction may ever bar a subsequent criminal prosecution or punishment.[4] It

[4] As we argued in *Ursery*, see 116 S. Ct. at 2140 n.1, the "multiple punishments" doctrine of double jeopardy law is essentially a rule that protects a defendant's legitimate expectation of finality in a *criminal* judgment and sentence, and may not properly be invoked by a defendant who merely claims that he was previously subjected to a punitive *civil* sanction. Indeed, even when the defendant previously has been criminally prosecuted, this Court's cases do not support the claim that the multiple punishments doctrine may be invoked to preclude entirely a subsequent proceeding. *Halper* itself suggested that a second sanction would be barred only to the extent that it was punitive, 490 U.S. at 449-450, 452, and this Court's cases support the proposition that double jeopardy violations, like other constitutional violations, must be remedied only to the extent of the injury suffered. See, *e.g.*, *Jones* v.

may also provide a vehicle for further guidance on the proper application of *Blockburger* v. *United States*, 284 U.S. 299 (1932), in ascertaining whether the criminal and civil "offenses" are the "same" for double jeopardy purposes.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Thomas, 491 U.S. 376, 380-387 (1989); *Morris* v. *Mathews*, 475 U.S. 237, 244-247 (1986).

[5] Under the *Blockburger* "elements" test, the banking violations that formed the basis for the sanctions assessed against petitioners are not "the same" as the offenses charged in the indictment—conspiracy, misapplication of bank funds, and making false entries. Each of the criminal offenses requires proof of (at least) one element not required by the civil charges, and vice versa.